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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JAMES LALIBERTE et al.,	
Plaintiffs and Appellants,	G040248
v.	(Super. Ct. No. 03CC07092)
PACIFIC MERCANTILE BANK,	O P I N I O N
Defendant and Respondent.	

Appeal from an order of the Superior Court of Orange County, David C. Velasquez, Judge. Reversed and remanded, with directions.

Arias, Ozzello & Gignac, Mark A. Ozzello and Mike Arias; Newmeyer & Dillion, Shane E. Coons and Thomas F. Newmeyer for Plaintiffs and Appellants.

Sheppard Mullin Richter & Hampton, Robert S. Beall II, Sean P. O'Connor, Brian B. Farrell and Karin Dougan Vogel for Defendant and Respondent.

* * *

Plaintiffs James LaLiberte and Jann and Dennis O'Connor appeal the trial court's order denying their class certification motion. Plaintiffs and other putative class members borrowed funds from Pacific Mercantile Bank to refinance their homes, and the gist of their claim is that defendant's alleged practice of omitting closing costs from its calculation of finance charges violated the Truth in Lending Act (TILA) (15 U.S.C. § 1601 et seq.). Plaintiffs contend the trial court erred by concluding common issues of fact and law did not predominate in their claims and the claims of the putative class. For the reasons that follow, we agree and therefore reverse the trial court's order and remand with directions for the court to enter a new and different order granting plaintiffs' certification motion.

I

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs obtained home refinance loans from defendant in 2002 and, on May 22, 2003, filed individual actions asserting defendant's calculation of finance charges violated TILA's disclosure standards. On November 21, 2003, plaintiffs amended their complaint to include class allegations consisting of two subclasses, one for persons who obtained loans from defendant after May 22, 2002, and another for persons obtaining loans after May 22, 2000.[1]

Plaintiffs sought discovery and, following a motion to compel, defendant agreed to plaintiffs' suggestion that defendant produce a random sample of the TILA disclosure statements and other documentation it provided borrowers on loans defendant made in the period between May 22, 2001, and May 22, 2002 (the exemplar loans).

[1] Presumably, these dates were determined by the initial complaint's filing date and the one-year statute of limitations for seeking statutory damages under TILA (15 U.S.C. § 1640(e)), and the three-year limitation for rescission under TILA (15 U.S.C. § 1635(f)).

Curiously, by requesting exemplar loan files only for the year-long period *ending* on May 22, 2002, plaintiffs chose not to demand production of any loan files for the alleged damages class, which commenced with loans *after* May 22, 2002.[2] Defendant produced the requested May 2001-May 2002 exemplar loan files in early 2005.

Meanwhile, after defendant pointed out the limitations period should be calculated from the date plaintiffs filed class allegations, not their original complaint, plaintiffs amended the class definitions to include only persons who obtained loans after November 21, 2002, for those seeking damages, and after November 21, 2000, for those seeking rescission. Following another round of amendments to the complaint, the trial court sustained defendant's demurrer without leave to amend on grounds rescission involved issues of fact differing for each borrower, and was therefore inappropriate for class treatment. Noting also that after their last amendment plaintiffs were no longer in the class they purported to represent, the trial court similarly sustained defendant's demurrer to the class claims seeking damages.

In a published opinion, we upheld the trial court's rescission conclusion but reversed concerning the plaintiffs' inadequacy as class representatives. (*LaLiberte v. Pacific Mercantile Bank* (2007) 147 Cal.App.4th 1 (*LaLiberte I*).) As we explained on the latter issue, "plaintiffs' adequacy as class representatives in the present case derives from the community of interest in the law and facts involved in the case . . . ." (*Id.* at p. 8.) In particular, we noted common questions of fact and law in the complaint's allegation defendant committed identical TILA disclosure violations concerning "both the named plaintiffs and the class members." (*LaLiberte*, at p. 7.) Thus, "[b]ecause dates

[2] As a result, our decision in this opinion is by a razor-thin margin.

on which they obtained their loans do not in any way affect the community of interest alleged between the named plaintiffs and class members, it is of no significance." (*Ibid.*)

On remittitur following *LaLiberte I*, plaintiffs, after a subsequent amendment to the complaint and demurrer, filed a fifth amended complaint defining the class as follows: "James LaLiberte and Dennis and Jann O'Connor and all persons who, at any time on or after November 21, 2002, obtained a closed-end refinance loan from Pacific Mercantile Bank primarily for personal, family or household purposes secured by residential (1-4 family) real property and dwellings, including, without limitation, residential real property which is the Borrower's principal dwelling, and who were charged a Closing Fee in excess of $100.00."

Plaintiffs also filed a motion for class certification. Plaintiffs attached to their motion the declaration of their expert on TILA compliance, Julia Greenfield. According to Greenfield, not all of the disclosure statements in the exemplar loan set included an itemization, required by TILA, of costs included in calculating the finance charge for obtaining the loan. And of those that included the requisite itemization, *none* included closing costs in calculating the finance charge. According to Greenfield, the omission of closing costs in the finance charge calculation violated TILA. Greenfield found the same omissions in the disclosure statements defendant provided for plaintiffs' loans.

Based on the "systematic" nature of the omissions and her experience with the software used by mortgage lenders to prepare TILA disclosure statements, Greenfield opined the omissions resulted from software "not programmed to recognize the [c]losing [f]ee as a [f]inance [c]harge." Consequently, "even though the [c]losing [f]ee was charged to every [b]orrower by [defendant], the document production software system

never included this fee in the calculation of the [p]repaid [f]inance [c]harge and the [a]mount [f]inanced." Greenfield concluded that because the closing fee in each loan exceeded $100, omitting the fee resulted in a TILA violation since TILA regulations only permitted a safe harbor for finance charge miscalculations of less than $100.

Plaintiffs' moving papers also included excerpts from the deposition testimony of two of defendant's officers, John Hampton and Jasna Penich. Both testified defendant used a program named DocMagic to generate its TILA disclosure statements and to calculate the finance charges disclosed on those statements. Hampton did not know what the software "list[ed] as finance charges." But Penich confirmed "that if for some reason DocMagic was not including a particular charge as a finance charge, then that discrepancy would appear virtually on every loan made by [defendant]."[3]

Defendant filed an opposition to class certification, plaintiffs replied and, after a hearing on the matter, the trial court denied certification. Plaintiffs now appeal.

II

DISCUSSION

Plaintiffs contend the trial court erred by denying their class certification motion. We agree. Code of Civil Procedure section 382 provides for certification "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . . . ."

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[3] Plaintiff submitted other evidence with its reply brief on the certification motion, including, for example, Hampton's deposition testimony admitting defendant did not maintain written procedures or guidelines to ensure TILA compliance, an anomaly in the banking industry. Plaintiff alluded to this issue in a deposition excerpt submitted with their moving papers, but it consisted only of a question plaintiffs' counsel asked Hampton, which Hampton did not answer. Because questions or statements by counsel are not evidence (Evid. Code, § 140), plaintiffs' moving papers included no evidence on this issue. Like the trial court, we decline to consider any of the evidence plaintiff submitted for the first time with their reply brief instead of in their moving papers.

Accordingly, "the focus in a certification dispute is on what type of questions — common or individual — are likely to arise in the action . . . ." (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 327 (*Sav-On*).) The party seeking certification must establish "a well defined community of interest among class members." (*Id.* at p. 326.) A community of interest exists where questions of law or fact common to all class members predominate over issues pertinent to individual plaintiffs. (E.g., *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470; *Reese v. Wal-Mart Stores, Inc.* (1999) 73 Cal.App.4th 1225, 1233.) When, as here, the court determines the issue of class propriety a hearing on a motion at which evidence is presented, "the issue of community of interest is determined on the merits and the plaintiff must establish the community as a matter of fact." (*Hamwi v. Citinational Buckeye Inv. Co.* (1977) 72 Cal.App.3d 462, 472 (*Hamwi*).)

"[I]f a class action 'will splinter into individual trials,' common questions do not predominate and litigation of the action in the class format is inappropriate. [Citation.]" (*Hamwi, supra,* 72 Cal.App.3d at p. 471.) "Thus, a class action cannot be maintained if each individual's right to recovery depends on facts peculiar to that individual." (*Kennedy v. Baxter Healthcare Corp.* (1996) 43 Cal.App.4th 799, 809.) In sum, "a trial court ruling on a certification motion determines 'whether . . . the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.'" (*Sav-On, supra,* 34 Cal.4th at p. 326.)

On appeal, "[t]o determine if the class has the requisite community of interest, we examine the allegations of the complaint, the declarations of the attorneys

[citation], and the evidence introduced at the certification hearing below. [Citation.] We then decide whether the trial court correctly determined the plaintiff satisfied [or failed to satisfy] its burden of showing that common issues of law and fact predominate over individual issues among the class members. [Citation.]" (*Norwest Mortgage, Inc. v. Superior Court* (1999) 72 Cal.App.4th 214, 221.) Phrased differently, "in determining whether there is substantial evidence to support a trial court's certification order, we consider whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment." (*Sav-On, supra*, 34 Cal.4th at p. 327.)

"In reviewing an order denying class certification, we consider only the reasons given by the trial court for the denial, and ignore any other grounds that might support denial." (*Quacchia v. DaimlerChrysler Corp.* (2004) 122 Cal.App.4th 1442, 1447; accord, *Bartold v. Glendale Federal Bank* (2000) 81 Cal.App.4th 816, 829.) This atypical review standard follows naturally from state "'public policy which encourages the use of the class action device'" (*Sav-On, supra*, 34 Cal.4th at p. 340) and from the safeguard that the trial court may decertify the class if further proceedings reveal common questions of fact or law do not predominate. (See *McKenna v. First Horizon* (D. Mass. 2006) 429 F.Supp.2d 291, 305-306, rev'd on others grounds (1st Cir. 2007) 475 F.3d 418; accord, Cal. Rules of Court, rule 3.764; see also *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 437-438 [California courts may look to federal cases on certification as persuasive authority].)

Here, in denying certification, the trial court observed that the plaintiffs' expert who examined the exemplar loan files "offered no opinion whether the TILA violations continued or persisted after May 22, 2002," and concluded, "*Plaintiffs have*

presented no other evidence from which it can be inferred the alleged TILA violations continued or persisted after May 22, 2002." (Italics added.) Absent any inference the alleged violations carried over into the class period beginning November 21, 2002, the trial court reasoned plaintiffs failed to show they shared a community of interest in common issues of fact or law with the putative class.

The record reveals the trial court was mistaken in its premise that no evidence suggested the alleged TILA violations continued. Simply put, plaintiffs presented evidence the claimed violation stemmed from a software programming error, which, by nature, would continue until corrected. In their moving papers, plaintiffs included deposition testimony confirming defendant used a software program called DocMagic to generate its TILA-mandated disclosure statements. DocMagic "calculate[d] the finance charge" that appeared on those statements. The deposition testimony also confirmed "that if for some reason DocMagic was not including a particular charge as a finance charge, then that discrepancy would appear virtually *on every loan made by [defendant]*." (Italics added.) Plaintiffs established the disclosure statements they received and those produced in the exemplar loan set — all presumably generated by DocMagic — omitted the closing fee from the finance charge calculation. Defendant generated plaintiffs' loan disclosure statements in April and May, 2002, and the statements in the exemplar loan set covered the entire preceding year, from May 22, 2001, through May 22, 2002.

Plaintiffs produced the foregoing evidence in their moving papers, and attached additional evidence to their reply. Taken as a whole, plaintiffs' evidence in their moving papers alone, without regard to any evidence on reply, established a common question of fact and a common question of law, respectively. Namely, the evidence

showed it was a common question of fact whether DocMagic, as set up and utilized by defendant, generated forms for plaintiffs and the class that omitted the escrow closing fee from the finance calculation and, if so, a common question of law would arise whether that omission violated TILA. As an analytical manner, whether an alleged error in setting up software has occurred and continues, and whether that error results in a TILA disclosure statement violation are questions readily amenable to resolution in a class setting. (See *Sav-On*, 34 Cal.4th at p. 327 [question on appeal is whether "the theory of recovery . . . as an analytical matter [is] likely to prove amenable to class treatment"].)

True, the trial court noted the deposition excerpts produced by plaintiffs specified no particular "time frame" in which defendant utilized DocMagic. On that basis, the court concluded it could not "infer this was a persistent or continuing problem[.]" But defendant did not object at its officers' depositions or in opposing class certification to questions or evidence concerning DocMagic, supporting the inference defendant used the program during the period pertinent to the lawsuit. Specifically, plaintiffs' attorney asked the deponents what software defendant used to complete the TILA disclosure statements, and they both answered, "DocMagic."

Because plaintiffs' evidence showed the nature of the problem was an alleged software programming glitch that omitted closing costs from the finance charge calculation, and because the nature of such a problem is that software will not fix itself and the evidence also showed defendant failed to fix the alleged problem for an entire year in the period preceding the class date of November 21, 2002, sufficient evidence supports the inference the problem continued into the class period. There was no evidence on which to infer defendant fixed the alleged software problem. It would be mere speculation to conclude defendant had done so, after undertaking no corrective

action for a year preceding the class date. The substantial evidence standard requires more than "'mere speculation as to probabilities without evidence . . . .'" (*California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 45.) Consequently, the trial court's stated reason for denying class certification is erroneous and we therefore reverse. Because an alleged software problem presents a common question of fact and a resulting common question of law whether omitting closing costs from a lender's finance charge disclosure violates TILA, we remand with directions for the trial court to enter a new and different order granting plaintiffs' class certification motion.

III

DISPOSITION

The trial court's order denying class certification is reversed. On remand, the trial court is directed to enter a new and different order certifying the class as proposed by plaintiffs. Appellants are entitled to their costs on appeal.

ARONSON, J.

WE CONCUR:

SILLS, P. J.

RYLAARSDAM, J.